151 U S 551

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RECORD, CASE No. 14,195.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 208.

EDWARD H. LEWIS, PLAINTIFF IN ERROR,

vs.

GEORGE C. WILSON ET AL., DOING BUSINESS UNDER THE NAME AND STYLE OF THE FLORIDA PRINTING AND PUBLISHING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

FILED OCTOBER 1, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 1, 1893.

1 In the Circuit Court of the United States, Northern District of Fla.

EDWARD H. LEWIS, Who is a Citizen of the State of Massachusetts,
vs.
GEO. C. WILSON, JNO. N. C. STOCKTON; MUMBY, Stockton & Knight, Composed of Frank W. Mumby, Jno. N. C. Stockton, and Raymond D. Knight; Wightman & Christopher, Composed of William S. Wightman and John G. Christopher; A. W. Owens, Daniel G. Ambler, George F. Drew, J. M. Lee, C. B. Smith, George Hughes, J. M. Barrs, Samuel Barton, F. P. Fleming, J. R. Tysen, C. E. Garner, Jno. N. C. Stockton, Trustee; F. W. Hawthorne, C. P. Cooper, J. S. Smith, Jr., Jas. P. Taliaferro, Jas. M. Fairlie, A. W. Cockrell, Chas. W. Da Costa, W. B. Young, J. R. Campbell, T. E. Stribling, Roswell H. Mason, B. M. Baer, A. W. Barrs, J. E. T. Bowden, Jas. M. Kraemer, and Telfair Stockton, Defendants, Doing Business under the Name and Style of Firm of "The Florida Printing & Publishing Company," and Citizens of the State of Florida.

Damages, $100,000.

The clerk will please issue summons *ad. res.* in the above-entitled cause, returnable according to law.

H. BISBEE,
Plaintiff's Attorney.

To P. Walter, Esq., clerk of said court.

Endorsements: In the circuit court of the United States, northern district of Fla. Edward H. Lewis *vs.* Geo. C. Wilson *et al.*, under the firm name of "The Florida Printing & Publishing Company." Præcipe for summons. Filed Sept. 22nd, 1887. Philip Walter, clerk, by Joseph H. Durkee, deputy clerk. H. Bisbee, plaintiff's attorney.

2 United States Circuit Court, Fifth Circuit, Northern District of Florida.

The President of the United States to the marshal of the northern district of Florida, Greeting:

You are hereby commanded to summon Geo. C. Wilson, Jno. N. C. Stockton; Mumby, Stockton & Knight, composed of Frank W. Mumby, Jno. N. C. Stockton, and Raymond D. Knight; Wightman & Christopher, composed of William S. Wightman and John G.

Christopher; A. W. Owens, Daniel G. Ambler, George F. Drew, J. M. Lee, C. B. Smith, George Hughes, J. M. Barrs, Samuel Barton, F. P. Fleming, J. R. Tysen, C. E. Garner, Jno. N. C. Stockton, trustee; F. W. Hawthorne, C. P. Cooper, J. S. Smith, Jr., Jas. P. Taliaferro, Jas. M. Fairlie, A. W. Cockrell, Chas. W. Da Costa, A. W. Barrs, W. B. Young, J. R. Campbell, T. E. Stribling, Roswell H. Mason, B. M. Baer, J. E. T. Bowden, Jas. M. Kraemer, and Telfair Stockton, defendants, doing business under the name and style of firm of "The Florida Printing & Publishing Company," and citizens of the State of Florida, if they may be found in your district, to be and appear before the circuit court of the United States, fifth circuit and northern district of Florida, at the rule day of said court, to be held at the clerk's office, in the city of Jacksonville, on the first Monday of October next, to answer unto Edward H. Lewis, who is a citizen of the State of Massachusetts, in said court on a plea of libel, wherein the plaintiff claims damages to the amount of one hundred thousand dollars; and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of this [SEAL.] court, at the city of Jacksonville, in said district, this 22nd day of September, A. D. 1887.

PHILIP WALTER, *Clerk*,
By JOSEPH H. DURKEE,
Deputy Clerk.

H. BISBEE, *Plaintiff's Attorneys*.

3 [Endorsed:] No. —. United States circuit court, northern district of Florida. Edward H. Lewis *vs.* George C. Wilson *et al.* Summons. Issued September 22nd, 1887; returnable October rules, 1887. Ret. and filed Sept. 30th, 1887. Philip Walter, clerk, by Joseph H. Durkee, D. C. H. Bisbee, plaintiff's att'y.

Received the within summons September 22nd, 1887, and executed the same 23rd September, 1887, within the northern district of Florida, by delivering a true copy hereof to A. W. Cockrell, one of the within-named defendants and president of the Florida Printing & Publishing Company, at Jacksonville, Florida.

W. C. BIRD,
U. S. Marshal.

4 In the Circuit — of the United States, Northern District of Fla.

Edward H. Lewis, who is a citizen of the State of Massachusetts, by H. Bisbee, his attorney, complains of Geo. C. Wilson, Jno. N. C. Stockton; Mumby, Stockton & Knight, composed of Frank W. Mumby, Jno. N. C. Stockton, and Raymond D. Knight; Wightman & Christopher, composed of William S. Wightman and John G. Christopher; A. W. Owens, Daniel G. Ambler, George F. Drew, J. M. Lee, C. B. Smith, George Hughes, J. M. Barrs, Samuel Barton,

F. P. Fleming, J. R. Tysen, C. E. Garner, Jno. N. C. Stockton, trustee; F. W. Hawthorne, C. P. Cooper, J. S. Smith, Jr.; Jas. P. Taliaferro, Jas. M. Fairlie, A. W. Cockrell, Chas. W. Da Costa, W. B. Young, J. R. Campbell, T. E. Stribling, Roswell H. Mason, B. M. Baer, A. W. Barrs, J. E. T. Bowden, Jas. M. Kraemer, and Telfair Stockton, defendants, who are citizens of the State of Florida, doing business under the name and style of "The Florida Printing & Publishing Company," the said company being an unincorporated company at the time of the transactions hereinafter complained of; for that whereas heretofore, to wit, on the 14th day of May, A. D. 1887, one Hattie F. Lewis died at Jacksonville, in the State of Florida, and afterwards, to wit, on the 19th day of July, in the year aforesaid, the defendants, under the name and style aforesaid, being then and there the owners and publishers of a newspaper known as "The News-Herald," did falsely and maliciously print and publish and did cause and procure to be falsely and maliciously printed and published in the said "The News-Herald," at Jacksonville aforesaid, of and concerning the plaintiff the following words—that is to say: "Was Miss Lewis murdered?" "The mysterious death of a beautiful young girl in this city." "A sudden illness and a terrible death. Shall this murder out?" the said defendants using said words in a defamatory sense of and concerning the plaintiff and meaning thereby that the said Hattie F. Lewis had been murdered at Jacksonville aforesaid, and that the plaintiff, who was then and there the father of the said Hattie F. Lewis, was guilty of the murder of her, the said Hattie F. Lewis, to the great wrong and injury of the said plaintiff, &c.

Second count. For that whereas heretofore, to wit, on the 14th day of May, A. D. 1887, at Jacksonville, Florida, one Hattie F. Lewis died, and the said defendants, under the name and style aforesaid, being an unincorporated company and being the owners and publishers of the newspaper known as "The News-Herald," afterwards, to wit, on the 19th day of July, in the year aforesaid, did falsely and maliciously print and publish and did cause and procure to be falsely and maliciously printed and published of and concerning the plaintiff in the said "News-Herald," at Jacksonville aforesaid, the following words—that is to say: "Was Miss Lewis (meaning thereby the said Hattie F. Lewis) murdered?" "The mysterious death of a beautiful young girl in this city" (meaning thereby the mysterious death of the said Hattie F. Lewis in the city of Jacksonville aforesaid). "A sudden illness and a terrible death" (meaning thereby the illness and death of the said Hattie F. Lewis). "Shall this murder out?" (meaning thereby
the murder of the said Hattie F. Lewis). "I believe there
5 was foul play about that girl's death" (meaning thereby
the death of the said Hattie F. Lewis), the said defendants, under the name and style of "The Florida Printing & Publishing Company" aforesaid, using the said words, so as aforesaid falsely and maliciously printed and published of and concerning the plaintiff, in a defamatory sense, and meaning thereby that the said Hattie F. Lewis had been killed by unlawful, criminal, and felonious

means, and that the plaintiff had used, employed, and applied such means, and had aided and assisted in the use and employment of such means to accomplish and compass the death of his daughter, the said Hattie F. Lewis, to the great wrong and injury of the plaintiff, &c.

Third count. For that whereas heretofore, to wit, on the 14th day of May, 1887, at Jacksonville, Florida, one Hattie F. Lewis died, and the said defendants, under the name and style of "The Florida Printing & Publishing Company," the said company being an unincorporated company, being the owners and publishers of a newspaper called and known as "The News-Herald," afterwards, to wit, on the 19th day of July, A. D., in the year aforesaid, at Jacksonville aforesaid, being then and there the owners and publishers of said newspaper, the said defendants, under the name and style aforesaid, did falsely and maliciously print and publish and did cause to be falsely and maliciously printed and published in the said "The News-Herald" of and concerning the plaintiff — following words—that is to say, "Was Miss Lewis (meaning the said Hattie F. Lewis) murdered?" "The mysterious death of a beautiful young girl in this city" (meaning thereby that the death of the said Hattie F. Lewis in Jacksonville aforesaid was mysterious). "A sudden illness and a terrible death" (meaning thereby the illness and death of Hattie F. Lewis). "Shall this murder out?" (meaning thereby the murder of Hattie F. Lewis aforesaid). "I believe there was foul play about that girl's death" (meaning thereby the death of the said Hattie F. Lewis).

And afterwards, to wit, on the 31st day of July, in the year aforesaid, the said defendants, under the name and style aforesaid, in "The News-Herald" aforesaid, at Jacksonville aforesaid, did falsely and maliciously print and publish and did cause and procure to be falsely and maliciously printed and published of and concerning the plaintiff the following words—that is to say: "People would like to see him behind the bars" (meaning thereby that the plaintiff was guilty of a crime and should be arrested and convicted of such crime and sentenced to jail or penitentiary); "that Lewis would not permit the coffin to be opened" (meaning thereby that the plaintiff at the funeral of his daughter, the said Hattie F. Lewis, would not permit the coffin containing the dead body of the said Hattie F. Lewis to be opened for fear that thereby evidence of this plaintiff's guilt of a felonious crime would be revealed and discovered); "and that all the bluff and protestations he (meaning the plaintiff) can make will not lighten the terrible suspicion of foul play that, proved or unproved, will ever haunt the dying bed of that unhappy daughter" (meaning thereby the said Hattie F. Lewis), the said defendants using the said words and each of them in a defamatory sense of and concerning the plaintiff and meaning thereby said Hattie F. Lewis had been killed by foul, criminal, and felonious means at Jacksonville aforesaid, and that the plaintiff had used and employed and aided and assisted in the use and employment
6 of such foul, criminal, and felonious means to compass and accomplish the killing and death of his said daughter, Hattie

F. Lewis, and for that reason was unwilling to have the remains of his said deceased daughter exposed to view at her funeral, and for the crime he had committed in that behalf ought to be a convict behind the bars and in a jail or penitentiary.

By reason whereof and of the premises in said several counts stated the plaintiff has been grearly injured in his credit, reputation, and character, and has been exposed to contempt and odium and has suffered great pain and anguish of mind; and the said plaintiff alleges as ground for special damages that, being engaged at the time aforesaid and since in mercantile trade, to wit, in the State of Texas, the plaintiff and his copartners in trade with him have by reason of the premises, to wit, by reason of the printing and publishing by the defendants of the defamatory words aforesaid, have been injured by the loss of trade and credit in their said business, and the plaintiff claims $100,000.00 damages.

H. BISBEE,
Plaintiff's Attorney.

Endorsements: In the circuit court of the United States, northern district of Fla. Edward H. Lewis *vs.* Geo. C. Wilson *et al.*, under firm name of "The Florida Printing & Publishing Co." Declaration. Filed Sept. 30th, 1887. Philip Walter, clerk, by Joseph H. Durkee, deputy clerk. H. Bisbee, plaintiff's attorney.

7 In the United States Circuit Court, Fifth Circuit, Northern District of Florida.

EDWARD H. LEWIS, Plaintiff,
vs.
GEORGE C. WILSON *et al.*, under the Firm Name and Style of "The Florida Printing and Publishing Company," Defendants.

And now come the defendants, by A. W. Cockrell & Son and Fleming & Daniel, their attorneys, and for plea to said declaration of file herein severally say:

1. Said defendants were not partners, as set up in said declaration.
2. Each of said defendants severally says that he is not and never has been a member of any copartnership under the firm name and style of the Florida Printing & Publishing Company.
3. And the said defendants severally say that they are not guilty.

A. W. COCKRELL & SON,
FLEMING & DANIEL,
Att'y- for Def'ts.

STATE OF FLORIDA,
County of Duval.

Personally before me comes W. B. Young, one of the defendants herein, who, being sworn in due form of law, deposes and says that the foregoing pleas and each and every allegation thereof are true in substance and in fact.

W. B. YOUNG.

Sworn to and subscribed before me this 8th day of December, 1887.

[SEAL.]

CHAS. S. ADAMS,
Notary Public, State at Large.

Endors-ments: In U. S. C't, northern dis't Fla. Edward H. Lewis, pl't'ff, *vs.* Geo. C. Wilson *et al.* Plea. Filed Dec. 9, 1887. Philip Walter, clerk. A. W. Cockrell & Son, Fleming & Daniel, att'ys for d'f'ts.

8 In the Circuit Court of the United States, Northern District of Florida.

EDWARD H. LEWIS
vs.
GEORGE C. WILSON *et al.*, Copartners under the Name and Style of the Florida Printing & Publishing Company.

Comes now the plaintiff, by H. Bisbee, his attorney, and says that he joins issue with the defendants upon the said several pleas by them above pleaded.

H. BISBEE,
Plaintiff's Attorney.

Endorsements: In the circuit court of the United States, northern district of Fla. Edward H. Lewis *vs.* Geo. C. Wilson *et al.*, copartners under the name and style of the Florida Printing & Publishing Co. Joinder of issue. Filed Dec. 10th, 1887. Philip Walter, clerk. H. Bisbee, —.

9 MONDAY MORNING, *April 9th*, 1888.

Court met pursuant to adjournment.

Present: The Honorable Thomas Settle, district judge.

Court was opened in due form by the crier.

There was also present R. M. Call, U. S. att'y; W. C. Bird, marshal; P. Walter, clerk.

EDWARD H. LEWIS
vs.
GEORGE C. WILSON *et al.*
} Libel.

This cause came on to be further heard this day, and the jury heretofore empannelled and sworn, being called, answered to their names as follows: R. G. Simkins, H. J. Pickett, D. W. Trumpeller, May R. Green, Willoughby Adams, Charles H. Dorsey, John Stewart, P. T. Mitchell, George H. Ambrose, Frank C. Cook, Jos. G. Alverez, and N. C. Prevatt.

After argument of counsel and the charge of the court the jury retired to their room to deliberate upon their verdict, and, after mature deliberation, returned the following verdict:

"We find all issues for the plaintiff, and that the defendants are guilty, and assess the damages at ten thousand dollars.

D. W. TRUMPELLER, *Foreman.*"

10 In the Circuit Court of the United States, Northern District of Florida.

EDWARD H. LEWIS
vs.
GEORGE C. WILSON *et als.*

APRIL 16TH, 1888.

Now come the defendants, by their attorney, and move the court for a new trial in said cause on the ground that the verdict of the jury is excessive.

A. W. COCKRELL & SON,
FLEMING & DANIEL,
Def'ts' Att'ys.

To H. Bisbee, Esq., pl'ff's att'y.

11 EDWARD H. LEWIS *vs.* GEO. C. WILSON *et als.* } December Term, 1887. Libel.

After the rendition of the verdict of the jury in this action and a motion by the defendants for a new trial on the ground that the damages assessed by the jury were excessive—

The court said from the bench that the defendants' motion would be granted unless the plaintiff consents to reduce the verdict from ten to five thousand dollars—

As the verdict is clearly excessive if we eliminate all damages which arose out of the claim of the plaintiff for special damages to his business in Texas, and to which he could lay no claim under the pleading and evidence in this case, and which the court withdrew from the consideration of the jury.

And the court further said if the plaintiff consents te reduce the verdict to five thousand dollars in pursuance of this suggestion, and the defendants decline to pay the judgment for that amount and desire to prosecute a writ of error to the supreme court, then, in that event, judgment will be entered up for the sum of ten thousand dollars upon the verdict of the jury.

And afterwards, to wit, on the 23rd day of April, A. D. 1888, comes the plaintiff, by his attorney, and enters his consent to the reduction of the verdict of the jury to the sum of five thousand dollars.

12 And then come the defendants, by their attorney, and submit to pay the said five thousand dollars.

It is therefore considered by the court that the plaintiff, Edward H. Lewis, do have and recover of and from the defendants, Geo. C. Wilson, John N. C. Stockton; Mumby, Stockton & Knight, composed of Frank W. Mumby, John N. C. Stockton, and Raymond D. Knight; Wightman and Christopher, composed of William S. Wightman and John G. Christopher; A. W. Owens, Daniel G. Ambler, George F. Drew. J. M. Lee, C. B. Smith, George Hughes, J. M. Barrs, Samuel Barton, F. P. Fleming, J. R. Tysen, C. E. Garner, Jno. N. C. Stockton, trustee; F. W. Hawthorne, C. P. Cooper, J. S. Smith, Jr., Jas. P. Taliaferro, Jas. M. Fairlie, A. W. Cockrell, Chas. W. Da Costa, W. B. Young, J. R. Campbell, T. E. Stribling, Roswell H. Mason, B. M. Baer, A. W. Barrs, J. E. T. Bowden, Jas. M. Kraemer, and Telfair Stockton, the sum of five thousand dollars and his costs, taxed at $644.25.

Comes now the plaintiff, Edward H. Lewis, by H. Bisbee, his attorney, on this the 27th day of April, A. D. 1888, and acknowledges the receipt of five thousand six hundred and forty-four and $\frac{25}{100}$ in full satisfaction of this judgment.

H. BISBEE, *Att'y.*

13 In the Circuit Court of the United States, Northern District of Florida.

EDWARD H. LEWIS
vs.
GEORGE C. WILSON *et al.*
} Libel. Damages, $100,000.

Comes now the plaintiff, by H. Bisbee, his attorney, and moves the court for a judgment on the verdict of the jury in the case, rendered on the 9th day of April, A. D. 1888, *nunc pro tunc* as of the date when it should have been rendered, according to law and the practice of this court, on the following grounds:

1st. Because said verdict was and is a legal verdict, duly rendered, and has not been set aside or modified by the court, nor in pursuance of any act or order of the court or any judge thereof acting within it- or his jurisdiction.

2nd. That all proceedings in this suit had and entered on the files of the court, it- minutes, dockets, and records, of the date of said verdict are null and void for want of jurisdiction of the court.

3rd. Because the defendants could not make the motion for a new trial, which they did make on the 16th day of April, A. D. 1888, on the ground that the laws of the State of Florida prohibited defendants from making a motion for a new trial after the expiration of four days from the date of the verdict rendered on the 9th day of April, A. D. 1888, and any action had on such motion was not within the jurisdiction of the court.

14 4th. Because plaintiff cannot apply to the Supreme Court for a writ of mandamus to order the court to enter judgment upon the verdict until a motion for such judgment has been refused, nor can defendants take a writ of error until a judgment on the verdict is entered up.

If the court enter judgment *nunc pro tunc* on the verdict for $10,000, plaintiff hereby offers and hereby binds himself to credit upon said judgment the sum of $5,000, paid by defendants on plaintiff's claim, April 27th, A. D. 1888.

Nov. 29th, 1889.

H. BISBEE,
Att'y for Plaintiff.

To Messrs. A. W. Cockrell & Son, of counsel for defendants.

Argument of counsel having been heard on this motion, it is ordered by the court that the motion be, and is hereby, denied; to which ruling of the court plaintiff, by his counsel and attorney, excepts. Done in open court Dec. 17th, 1889.

DON A. PARDEE, *Judge.*

15 Circuit Court of the United States, Northern Districr of Florida.

Know all men by these presents that we, Edward H. Lewis, R. G. Ross, are held and firmly bound unto George C. Wilson, John N. C. Stockton; Mumby, Stockton and Knight, composed of Frank W. Mumby, John N. C. Stockton, and Raymond D. Knight; Wightman & Christopher, composed of William S. Wightman and John G. Christopher; A. W. Owens, Daniel G. Ambler, George F. Drew, J. M. Lee, C. B. Smith, George Hughes, J. M. Barrs, Samuel Barton, F. P. Fleming, J. R. Tysen, C. E. Garner, John N. C. Stockton, truste-; F. W. Hawthorne, C. P. Cooper, J. S. Smith, Jr., Jas. P. Taliaferro, James M. Fairlie, A. W. Cockrell, Charles W. Da Costa, W. B. Young, J. R. Campbell, T. E. Stribling, Roswell H. Mason, B. M. Baer, A. W. Barrs, J. E. T. Bowden, James Kraemer, and Telfair Stockton, doing business under the name and style of the Florida Printing & Publishing Company, and to the heirs, executors, and administrators of each of them, in the penal sum of five hundred dollars; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 16th day of April, A. D. 1890.

Whereas the above-named Edward H. Lewis hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the suit by the said Edward H. Lewis against the said obligees by the circuit court of the United States for the northern district of Florida:

Now, therefore, the condition of this obligation is such that if the above-named Edward H. Lewis shall prosecute his said writ of error to effect and answer all costs if he shall fail to make his pleas good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

EDWARD H. LEWIS. [L. S.]
R. G. ROSS. [L. S.]

The above bond is taken and approved this twenty-third day of March, 1890.

CHAS. SWAYNE,
U. S. Judge.

Endorsements: In the United States circuit court, northern district of Florida. Edward H. Lewis *vs.* George C. Wilson *et al.* Bond for writ of error. Filed Apr. 24, 1890. Philip Walter, clerk.

16 UNITED STATES OF AMERICA, *ss:*

To George C. Wilson, John N. C. Stockton; Mumby, Stockton & Knight, copposed of Frank W. Mumby, John N. C. Stockton, and Raymond D. Knight; Wightman & Christopher, composed of William S. Wightman and John G. Christoph-; A. W. Owens, Daniel G. Ambler, George F. Drew, J. M. Lee, C. B. Smith, George Hughes, J. M. Barrs, Samuel Barton, F. P. Fleming, J. R. Tysen, C. E. Garner, John N. C. Stockton, trustee; F. W. Hawthorne, C. P. Cooper, J. S. Smith, Jr., James P. Taliaferro, Jas. M. Fairlie, A. W. Cockrell, Charles W. Da Costa, W. B. Young, J. R. Campbell, T. E. Stribling, Roswell H. Mason, B. M. Baer, A. W. Barrs, J. E. T. Bowden, James Kraemer and Telfair Stockton, doing business under the name and style of the Florida Printing and Publishing Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Florida, wherein Edward H. Lewis is the plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

CHAS. SWAYNE,
Dist. Judge.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 23rd day of April, in the year of our Lord one thousand eight hundred and ninety.

CHAS. SWAYNE,
Dist. Judge.

Endorsement: Received this writ July 8th, 1890, and served it by delivering a true copy of same to A. W. Cockrell & Son, attorneys, and exhibiting the original to them at the same time, July 9th, 1890, and served it by delivering a true copy of same to J. M. Barr, attorney and a surviving partner of the law firm of Fleming & Daniel, July 10th, 1890. E. C. Weeks, U. S. marshal, by Roy P. Moody, deputy.

17 [Endorsed:] In the Supreme Court of the United States. Edward H. Lewis *vs.* George C. Wilson *et al.* Citation. Filed Jul- 10, 1890. Philip Walter, clerk.

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the northern district of Florida, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in said circuit court, before you, between Edward H. Lewis and George C. Wilson, John N. C. Stockton; Mumby, Stockton & Knight, composed of Frank W. Mumby, John N. C. Stockton, and Raymond D. Knight; Wightman & Christopher, composed of William S. Wightman and John G. Christopher; A. W. Owens, Daniel G. Ambler, George F. Drew, J. M. Lee, C. B. Smith, George Hughes, J. M. Barrs, Samuel Barton, F. P. Fleming, J. R. Tysen, C. E. Garner, John N. C. Stockton, trustee; F. W. Hawthorne, C. P. Cooper, J. S. Smith, Jr., James P. Toliaferro, James M. Farlie, A. W. Cockrell, Charles W. Da Costa, W. B. Young, J. R. Campbell, T. E. Stribling, Roswell H. Mason, B. M. Baer, A. W. Barrs, J. E. T. Bowden, James Kraemer, and Telfair Stockton, doing business under the name and style of the Florida Printing and Publishing Company, a manifest error hath happened, to the great damage of the said Edward H. Lewis, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and 19 proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23rd day of April, in the year of our Lord one thousand eight hundred and ninety.

[Seal U. S. Circuit Court, Fifth Circuit, Northern Dist. of Florida.]

PHILIP WALTER, *Clerk.*

[Endorsed:] In Supreme Court United States. Edward H. Lewis, plaintiff in error, *vs.* George C. Wilson *et al.*, defendants in error. Filed Apr. 23, 1890. Philip Walter, clerk.

20 In the Supreme Court United States.

EDWARD H. LEWIS, Plaintiff in Error,
vs.
GEORGE C. WILSON *et al.*, Defendants in Error.
} Libel.

Now comes Edward H. Lewis, the plaintiff in error, by H. Bisbee, his attorney, and assigns the following errors:

First. The circuit court erred in its ruling that it had jurisdiction to entertain and hear the motion for a new trial made by the defendants on the 16th day of April, A. D. 1888, that being the seventh day after the verdict of the jury was rendered, on the ground that the statute of the State of Florida regulating new trials prohibits a party from moving for a new trial in all cases at law "unless the party intending to make the same shall file his reasons with the clerk, in writing, and cause his motion to be placed upon the motion docket within four days after the verdict shall have been rendered."

Second. The said circuit court erred in hearing the motion for a new trial without written notice being served, as required by rule ninth of said court, which is in the following words, to wit: "All motions (except such as are granted, of course) must be entered upon the motion docket and due notice thereof served upon the opposite party and the proof of service filed before the hearing.

Third. The said circuit court erred in holding it had jurisdiction to hear the motion of defendants for a new trial and granting a new trial unless the plaintiff would consent to reduce the verdict to five thousand dollars, because the laws of the State of Florida
21 prohibiting such a motion being made unless made within four days after the verdict is obligatory on the said court.

Fourth. The said circuit court erred in denying the plaintiff's motion for judgment on the verdict of the jury for $10,000.00, with interest.

Wherefore plaintiff prays the judgments of the said court be reversed.

July 12th, 1890.

H. BISBEE,
For Plaintiff in Error.

Endorsement: In Supreme Court United States. Edward H. Lewis *vs.* George C. Wilson *et al.* Assignment of errors. Filed Jul- 12, 1890. Philip Walter, clerk. H. Bisbee, for plaintiff.

22 United States Circuit Court, 5th Judicial Circuit, Northern District of Florida.

EDWARD H. LEWIS
vs.
THE FLORIDA PRINTING & PUBLISHING COMPANY. } Libel.

I, Philip Walter, clerk of the United States circuit court, 5th circuit and northern district of Florida, do hereby certify that the foregoing pages, numbered from 1 to 21, inclusive, *is* a true, full, & complete record of the papers used in the above-entitled cause in the motion for a verdict on the judgment in the above cause.

Witness my hand and official seal, at the city of Jacksonville, in the circuit and district aforesaid, this 1st day of July, 1890, and of our Independence the 115th year.

[Seal U. S. Circuit Court, Fifth Circuit, Northern Dist. of Florida.]

PHILIP WALTER, *Clerk.*

Endorsed on cover: Case No. 14,195. N. Florida C. C. U. S. No. 208. Edward H. Lewis, plaintiff in error, *vs.* George C. Wilson *et al.*, doing business under the name and style of The Florida Printing and Publishing Company. Filed October 1, 1890.

9208

Office Supreme Court U. S.
FILED.
DEC 23 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

EDWARD H. LEWIS,
Plaintiff in Error,

vs.

GEORGE C. WILSON ET AL.,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

H. BISBEE,
Attorney for Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

Supreme Court of United States.

OCTOBER TERM, 1893.

EDWARD H. LEWIS,
Plaintiff in Error,
vs.
GEO. C. WILSON ET AL.,
Defendants in Error.

No. 208.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

The plaintiff, who is a citizen of the State of Massachusetts, sued the defendants, citizens of the State of Florida, for libel. The pleadings consist of the declaration containing three counts, and pleas of defendants that they were not partners and were not guilty, and joinder of issue by the plaintiff. The trial of the case commenced April 1st, 1888, and continued until the 9th day of said month, when the jury returned the following verdict:

"We find all the issues for the plaintiff, and that the defendants are guilty, and assess the damages at $10,000."

There appears in the transcript a judgment for $5,000 and costs (Record, p. 7). At a subsequent term of Court, to wit, November 29th, 1889, the plaintiff moved for judgment, *nunc pro tunc*, for $10,000, in accordance with the verdict, upon which the Court made the following order:

"Argument of counsel having been heard upon this motion, it is ordered by the Court that the motion be, and the same is, denied. To which ruling of the Court the plaintiff, by its counsel, excepts.

"Done in open court, December 17th, 1889.

"DON A. PARDEE,
"Judge."

This writ of error is prosecuted to reverse these judgments. The declaration will be found on pages 2 to 5, inclusive; the pleas on page 5; the verdict on page 6; the so-called judgment on pages 7 and 8; the motion for judgment *nunc pro tunc*, and the ruling of the Court thereon, on pages 8 and 9; assignments of error on pages 11 and 12. The suit was brought to recover damages for publishing a libel accusing the plaintiff of the infamous charge of murdering his own daughter, in Jacksonville, Florida.

ARGUMENT.

The fourth error assigned is as follows: The Court erred in denying the plaintiff's motion for judgment on the verdict of the jury for $10,000 and interest. It is insisted this was error on the following grounds: There was before the Court below on this motion the pleadings and the verdict for $10,000 and the judgment for $5,000, and, as we contend, there was nothing else before the Court. Surely a judgment for $5,000 on a verdict for $10,000, without any order of the Court reducing the verdict and without any remittiter by the plaintiff, is erroneous. It is fundamental that the judgment must conform to the verdict.

Bennett vs. Butterworth, 11th Howard, 689, 675-6.

Such an error is apparant on the record, and no exception was necessary.

91st United States, page 130.

The Court below, Judge PARDEE presiding, denied the motion for judgment *nunc pro tunc* on the ground that the questions were proper ones for the Supreme Court to decide on writ of error, and that at a subsequent term the court below had no jurisdiction.

Second Point.

We submit that there is no order of the Court below reducing the verdict, nor any consent of plaintiff's counsel that it should be reduced. There are, in the transcript of the record, what appears to be certain recitals by the Clerk on the 7th page of the record, commencing at the top of that page and ending at the words "It is, therefore, considered by the Court," &c. On page 7 there purports to have been a motion for a new trial made April 16th, 1888, on the ground that the verdict of the jury is excessive, but it does not appear that this motion was ever filed, or ever put on the motion docket; it does not appear that *any notice of such a motion* was ever served on the plaintiff or his counsel; it does not appear that such a motion *was ever brought before the Court for consideration, or argued by counsel.* Following this paper purporting to be a motion for a new trial are certain recitals by the Clerk stating what the Court said from the bench *after the motion was made, but not after it was heard.* These recitals are in the following words: "The Court said from the bench that the defendant's motion would be granted unless the plaintiff consents to reduce the verdict from $10,000 to $5,000. As the verdict is clearly excessive, if we eliminate all damages which arose out of the claim of the plaintiff for special damages to his business in Texas, and to which he could lay no claim under the pleading and evidence in this cause, and which the Court withdrew from the consideration of the jury. And the Court further said if the plaintiff consents to reduce the verdict to $5,000, in pursuance of this suggestion, and the defendant decline to pay the judgment for that amount, and desire to prosecute a writ of error to the Supreme Court, then, in that event, judgment will be entered up for the sum of $10,000 upon the verdict of the jury."

An opinion as to what the Judge *would do*, is of no effect. It is the judgment or order subsequently signed, that this Court regards (1st Wall., 699).

There is no date to these recitals. There is nothing to establish that they were reduced to writing at the time they purport to have been made, nor that they were filed in Court or signed by the Judge. They appear to be recitals or entries made by the Clerk himself, of what he understood the Judge to say from the bench, respecting what he (the Judge) *would do in certain events.* The substance of them is that the Judge proposed to sit as arbitrator and arbitrarily determine how much the defendants should pay to the plaintiff, and to coerce the defendants to pay $5,000, and the plaintiff to accept $5,000 in settlement of the controversy. That is to say, if defendants declined to pay a judgment which the Judge suggested that he would render for $5,000, and desired to prosecute a writ of error to the Supreme Court, then the judgment would be entered up for the sum of $10,000, upon the verdict of the jury. Nothing purports to have been said in regard to the costs, which amount to several hundred dollars.

Next after the said recitals there appears on page 7 as follows:

" And afterwards, to wit, on the 23d of April, 1888, comes the plaintiff by his attorney, and enters his consent to the reduction of the verdict of the jury, to the sum of $5,000. And then comes the defendants by their attorney, and submit to pay the said $5,000."

These last recitals are not signed by counsel for either party; they are dated one week after the date of the motion for a new trial; they are not incorporated into any order of the Court, or made a part of the record by any order of the Court; but they appear to have been entries made by the Clerk on his own understanding of what occurred. Indeed there is nothing here to show that at the time of these several entries and recitals the Court was in session. There is nothing in the transcript to show that the Court was in session after the 9th day of April, when it met pursuant to adjournment.

Record, page 6.

It must be understood that this was the December term, commencing on the first Monday in December, 1887. Our contention upon these recitals or entries on page 7 is:

1st. That they constitute no part of the record. It has often been ruled by this Court that the opinion of the trial Judge and entries by the Clerk on motions and affidavits of the parties do not constitute any part of the record which can be considered by the appellate court.

The case of Young vs. Martin, 8th Wall., 354, is in point. There the Clerk made entries reciting the action of the Court and its rulings on the pleadings; reciting the exceptions taken to the rulings of the Court by counsel, and reciting that certain motions were made and overruled.

See pages 355, 356.

This Court, speaking through Mr. Justice FIELD, said: "These minutes are mere memoranda, stating in the briefest and most general manner the proceedings had in Court. *They do not purport to be the particulars* *of the proceeding, but only describe their character.* They were made to preserve an account of the general order of business of the Court, and to assist the Clerk in subsequent preparation of the formal record." *The Court in that case declined to presume that there was an order overruling a demurrer when there was no such order in the transcript.*

In the case of Reed vs. Marsh, 13th Peters, 153, it was held that the certificate of the Clerk that the motion for a new trial was made and certain papers were filed upon which motions were founded was no part of the record.

To the same effect is 91 United States, 127.

In England vs. Gebhardt, 112 United States, 502, it was held that the opinion of the Court and other papers not made a part of the record by some order of the Court, were no part of the record proper, and could not be considered by the Court.

In the case of Ingles vs. Cooledge, 2d Wheat., 363, it was held that the Court would look only to what is technically the record, and the report of what the Judge did is no part of the record.

To the same effect is Fisher Lessors vs. Cockrell, 5th Peters, 248.

In the case of Burr vs. Des. Moines Company, 1st Wall., 101, this Court, speaking through Justice MILLER, said: "It is very clear that a paper not signed by counsel, nor entered on the record of the court, nor made a part of the record of the case by bill of exceptions, or in any other manner, cannot be considered by this Court as a foundation on which it is to affirm or reverse the case." Our contention, then, is that these several matters on page 7 of the transcript are no part of the record of the case, and are not before this Court for judicial action. Also that they were not before the Court below, and should not have been given any force or effect by the Court below on the motion for judgment *nunc pro tunc.*

There is nothing whatever to authenticate over the signature of the Judge or in any other way that he did say what the Clerk has made him say; nor is there any pretense of any order of the Court executing what the Clerk recites the Judge said he would do. In other words, there is nothing to establish that the Judge did what he said he would do. Consequently if the counsel for the parties in the cause did anything at all it was done voluntarily and not under any order of the Court.

Consent of Counsel.

The recitals on page 7 of the record, that counsel for the plaintiff entered his consent to the reduction of the verdict of the jury to the sum of $5,000, and that defendants by their counsel submitted to pay the said $5,000 are ineffectual for any purpose. As already stated, if they did this it was voluntary and not because they were compelled to do it by any order of the Court. But we insist that these recitals cannot be considered by the Court for the reasons and on the authorities already given. The recital is that the plaintiff by his attorney entered his consent, *but the consent itself signed by counsel does not appear*. It is the Clerk's description of his understanding of the character of the proceeding, but not a transcript of the proceeding itself. The very thing which this Court said was not before them and they could not consider.

8th Wallace, 356.

Following these recitals is the judgment in due form for the plaintiff for $5,000 and costs taxed at $644.25. Below that, on page 8, is an acknowledgment, by the plaintiff's attorney, that he had received the said sum of money in full satisfaction of this judgment. The plaintiff's receipt for this sum of money in satisfaction of that judgment in nowise affects his rights to prosecute this writ of error. Even if the entries by the Clerk of what he understood counsel to consent to is considered by the Court, there is an utter absence of any agreement on the part of plaintiff not to prosecute a writ of error, and there is an utter absence of any consideration moving from the defendants to the plaintiff for such promise on plaintiff's part. It has been repeatedly held that a party, by entering satisfaction of a judgment or a decree in his favor, does not affect his right of appeal or to prosecute writ of error where he is contending for more than the amount of the judgment or decree.

United States vs. Dashiel, 3d Wall., 688.
Merian vs. Hass, 3d Wall., 687.
Irwin vs. Lowry, 7th Howard, 483.
O'Harroll vs. McConnell, 93 United States, 150.
Embry vs. Palmer, 107 United States, 3 and 8.
22d Florida, p. 532.

Therefore, all that the plaintiff has done is simply to receive $5,000, and, according to the verdict, is entitled to $5,000 more, and the plaintiff has not in any manner bound himself not to litigate for the balance of the verdict.

As already stated, there is nothing in the record to show that this judgment was entered up in term, or that the Court ordered such a judgment to be entered. The most favorable view of all this would be, if it is before the Court at all that on a suggestion by the Judge from the bench that he would make a certain order in the case (which he never did make) defendants voluntarily agreed to pay $5,000, and the plaintiff agreed to accept $5,000, on the verdict, there being no agreement whatever affecting the rights of either of the parties as to the balance of the verdict.

We, therefore, respectfully submit that the plaintiff was clearly entitled to a judgment *nunc pro tunc*, for which he duly made a motion at a subsequent term of the Court, to wit, November 29, 1889, and that the Court erred in denying such motion December 17, 1889.

See pages 8 and 9 of Record.

Had the Court exercised its judgment or discretion and actually ordered that a motion for a new trial be granted unless the plaintiff consented to reduce the verdict to $5,000, the result might have been different, but the suggestion of the Court respecting what it would do in the future is not the exercise of judicial action amounting to judgment or order in the premises. It is nothing more in legal effect than the expression of a wish or recommendation of what the parties themselves should do.

Third Point.

MOTION FOR NEW TRIAL.

It does not affirmatively appear from the transcript that any motion for a new trial was ever put on the motion docket or filed in court, nor that any notice of such a motion was ever served on the plaintiff. Nor that such a motion was ever argued or that plaintiff's counsel ever had an opportunity to argue it.

The statute of Florida on the subject of new trial reads as follows:

> "No motion for a new trial or in arrest of judgment shall be made, unless the party intending to make the same shall file his reasons with the Clerk, in writing, and cause his motion to be placed upon the motion docket *within four days* after the verdict shall have been rendered, and during the same term."

Thompson's Digest, p. 351.
Revised Statutes of Florida, Section 1180.

This statute has always been held to be obligatory upon litigants in the Court.

Williams vs. State, 18th Florida, 886.
Dupeys vs. Thompson, 16th Florida, 71.

Should the Court hold that the several matters and things already treated of, found on pages 7 and 8 of the record, are before the Court for consideration, then we bring to the consideration of the Court the other assignments of error.

The first error assigned is on page II. of the record—that the Court erred in entertaining a motion for a new trial made by the defendants on the 16th day of April, 1888, that being the *seventh day* after the verdict of the jury was rendered. Under this head we make the following points :

(a) It does not appear that any motion for a new trial was filed in court, nor that such a motion was put on the motion docket. One or the other is indispensable ; otherwise, the motion is not before the Court for consideration.

16th Florida, 71.
18th Florida, 886.

(b) It does not appear that any reasons for a new trial were filed with the Clerk or placed on the motion docket as required by the statute of Florida and the rules of Court.

16th Florida, 71.

What purports to be a motion for a new trial (Record, p. 7) does not contain any reasons at all; and it merely states that the verdict of the jury is excessive. It does not point out that the jury acted from passion or prejudice or corruption, which are the only reasons on which the Court could grant a new trial on the ground of the verdict being excessive in a libel suit. Our contention here is that the Court had no power or jurisdiction to entertain a motion *ex parte* and out of term, and without notice to the party whose rights would be prejudiced. So far as the record discloses all these proceedings were *in pais*.

(c) There is no evidence in the record that any notice of such a motion was ever given to the plaintiff in any way, shape or manner.

This is essential, as already appears in the cases cited, according to the practice and procedure in Florida, and also according to the rule of the Court below in the following words: "All motions, except such as are granted of course, must be entered upon the motion docket, and due notice thereof served upon the opposite party, and the proof of service filed before the hearing."

Record, page 12.

(d) The statute above quoted limits the time in which a party can make a motion for a new trial to four days after the verdict. This verdict was rendered on the 9th of April, and the paper called a motion is dated the 16th day of the said month. Therefore, if the motion had been filed with the reasons or put on the motion docket and due notice served, still we contend the Court had no right, and it was error in the Court to permit the defendants, to make a motion after the time fixed by statute had elapsed.

We do not contend that the discretion of the Court below in granting or refusing a motion for a new trial can be reviewed by this Court when such motion is legally before the Court, but we do contend that this statute of the State of Florida is obligatory upon the defendants in the Federal Court, and that it was error in the Court below to permit the defendants to make a motion for a new trial, or to entertain such a motion, on the 16th day of April, 1888, that being the seventh day after the rendering of the verdict, without notice and without filing motion, or putting same on docket. It cannot be denied that this statute had always been considered as obligatory on the party in the Federal Court the same as in the State Court up to the date of the making of the motion in this action. Whether this statute, restricting a party to four days after the verdict to make his motion for a new trial, comes under the head of Practice, Pleadings and Form and Mode of Proceeding, or under the head that State Laws are Rules of Decisions in Trials at Common Law, or under the head of Statute of Limitations, we contend that it is *obligatory on the parties* in the Federal Courts, and it was error of the Court to entertain the motion for a new trial after the lapse of the period fixed by the statute. The question here presented is quite different from those in cases where this Court has ruled that the action of the trial Court in granting or refusing a new trial could not be assigned as error. The Act of Congress providing that the statute of the State shall be rules of decision in trials at common law, embraces all the actions of the Court from the commencement of the trial up to judgment. We understand it to be well established that a new trial is a proceeding at common law, and a hearing to obtain it is regarded as a hearing at common law, on a common law question.

One of the early cases on this subject is the case of

Clark vs. Sohier, 1st Wood. & Minot's Rep., pp. 368-371.

This statute of the State of Florida upon the subject of new trials is not repugnant or inconsistent with any Act of Congress. The Act of Congress authorizing Federal Courts to grant new trials declares that such Court shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law. The Act of the Florida Legislature does not undertake to prohibit the Federal Court from granting a new trial for such reasons, *but it does prohibit a party* from making a motion for a new trial unless made within a specified time. This Florida statute is founded in the highest wisdom, in that it requires the motion to be made and the reasons stated within a period of four days, when what occurred at the trial is fresh in the minds of the counsel and Court. Under it in the State Court the party recovering a verdict is entitled to his judgment and execution after the expiration of four days from the date of the verdict, and thereby obtains a lien on the property of his adversary, both real and personal, after the expiration of this period. Very disastrous and mischievous consequences would result to suitors in the Federal Court if it is held that this statute is not operative. The term of the Federal Court in Jacksonville commences the first Monday in December and generally continues, by adjournment, through nearly the entire year. If, then, it is the right of a party to move for a new trial at any time during the term, a non-resident creditor suing a Florida debtor could not obtain a lien until after the property of the debtor had been swept away by judgments and executions in the State Court in suits commenced at the same time; for on this theory the law, as it existed at the time of the proceedings in this case, a motion for a new trial after four days would prevent execution, and this right of property would be effected to the injury of the creditor who voluntarily brought suit in the Federal Court or whose suit was removed there by his adversary.

Debtor by collusion with his creditor in the State Court could defeat priority of lien of judgment in the Federal Court, by inducing him to move to set aside a verdict or judgment in the latter Court after the lapse of four days.

In fact, uniformity of procedure would be destroyed. The same benefit by judgment and execution as in the State Court would be defeated.

It was held in the case of Clarke vs. Sohier, *supra*, p. 373, as follows: "If State Laws operate on new trials they, of course, must govern if no Act of Congress interferes and forbids it." And the Court also held in that case that the State Law and the Act of Congress must be construed the same as two statutes upon the same subject by the same Legislature, and that one does not repeal or annul the other unless words of repeal are used or the provisions in one are opposed or repugnant to those in the other.

Citing
4th Howard, 37.
5th Wheat., 22.

In the case of Clarke vs. Sohier the question elaborately considered was whether the statute of the State of Maine, authorizing the Court to grant a new trial three years after the verdict, and consequently after the expiration of the term, was obligatory on the Federal Court; and the Court held that it was obligatory because it conferred *a new right,* and that the 34th Section of the Judiciary Act applied. The decisions of this Court are uniform that where a new right is conferred upon a party by the State statute that right will be enforced in the Federal Court. The learned Judge, in the case of Clarke vs. Sohier, uses the following language: "This 34th Section of the Judiciary Act is a very important one; *and reaches all rules as to civil rights by State statutes* within their jurisdiction where Congress have not regulated the case. * * * It includes rules of evidence altered by State statutes.

McNeill vs. Holland, 12th Pet., 84-89.

It reaches usages in States that have a force of laws,
Swift vs. Tysen, 16th Pet., 18,
and liens by judgments.
1st Baldwin, 274.

and all statutes of States regulating most rights, and especially local laws as to real estate not inconsistent with the laws and rights of the United States
N. O. vs. Phoebis, 11 Pet., 175.

Congress has not, by statute, fixed the time within which a motion for a new trial shall be made, and it is, therefore, competent for the State Legislature to do so.

Why is not a State statute abridging the time for a

motion for a new trial as obligatory on the Federal Court, as a statute enlarging the time? Congress has authorized the Federal Courts to grant new trials "*for resasons for which new trials have usually been granted in Courts of law.*" *This statute confines the Courts to such reasons when they act on the motion.*

Revised Statutes, Sec. 726.
Milliken vs. Ross, 9 Fed. Rep., 855.
Clark vs. Sohier, 1 W. & M. Rep., 368–372.
Parsons vs. Bellford, 3 Pet., 446.

At common law the motion could be made unless changed by rule, any time during the term. But the State Legislature can fix the time when a litigant shall apply or make his motion.

It has frequently been held that a State Statute enlarging the time beyond the term of Court, was binding on a party in the Federal Court, and on the Court itself, and we submit that there is no good reason why a Statute of the State abridging the time should not be held obligatory.

It is a part of the practice, pleading, form and mode of proceeding to obtain a hearing on a motion for a new trial, and within Sec. 914 of the Revised Statutes, as clearly as the practice, pleading, form and mode of proceeding, to obtain a hearing in any other stage of the case.

But it is something more than this.

RIGHT TO JUDGMENT AND EXECUTION AFTER FOUR DAYS FROM VERDICT.

Our contention is that the statute of Florida prohibiting a party from making a motion for a new trial after the lapse of four days from the verdict confers a new right upon the plaintiff in this casewhich he did not have at common law. At common law the plaintiff would recover a verdict subject to the right of the defendant to make a motion for a new trial at any time during the term, and consequently subject to the power of the

Court to set aside verdict at any time during the term. This statute gives the plaintiff an absolute right to the judgment and execution after the lapse of four days from the verdict, so far as that right can be effected by a motion for a new trial. In this case the defendant being prohibited from making a motion for a new trial seven days after the verdict, it logically follows that the plaintiff had a vested right to a judgment on his verdict after the expiration of that time. Even if the judgment was not formally entered on the verdict immediately upon the expiration of the four days does not change the result. The right to it is the same after the lapse of four days after the vervict, and the plaintiff's counsel could have judgment entered at any time he asked for it as of that date. The right to a judgment on a verdict which the party against whom it is rendered has no power to move to set aside is as much a vested right as a vested right to anything else. A verdict is property, and the right to judgment thereon is a right of property, and is sacred and as much entitled to protection as any other civil right, and we can see no reason why the statute of the State in question, conferring such a right upon a party who has recovered a verdict, should not be held operative in the Federal Court. It has been judicially determined that a verdict for damages gives to the party in whose favor it is given a vested right to such damages.

Harrigton vs. County Commissioners, 22 Pickering, 263.
People vs. Supervisors of Winchester, 4th Barb., 64.

Had the plaintiff recovered a verdict in the State Court, his right to a judgment after the lapse of four days could not be questioned, and we do not understand how he can lose this right by going into the Federal Court. On general principles, the plaintiff in the Federal Court neither loses nor forfeits any right which he would have had in the State Court. The laws of the State are presumed to be administered in both Courts alike, and by such laws are the rights of the parties determined, whether they are in the State Court or the Federal Court. "Personal rights, secured by the common law, Constitution or statute, cannot *be taken away by the exercise of the power to* set aside a judgment" (18 Wall., 163).

In the case of Insurance Co. vs. Wilson, 8th Pet., 291-293, 303, it was held that a law of the State requiring a Judge to sign a judgment three days after the verdict was obligatory on the Federal Court, and that after the lapse of that time he had no power to set it aside. In that case the court below was compelled by mandamus to enter up a judgment on the verdict.

Valls vs. Harrison, 93 U. S., p. 234.

In the case of Equator Co. vs. Hall, 106 U. S., pp. 86, 88, limiting the time in which a defeated party in a case of ejectment could apply for a new trial, it was held that this provision of the law of Colorado was obligatory on the Federal Courts sitting in the State of Colorado.

In the case of Tice vs. School District, 14 Fed. Rep., p. 886, it was held that the law of the State of Nebraska limiting the time in which an application for a new trial should be made was obligatory on the Federal Court. On page 888 of that report the learned Judge said: "It seems to be the recent policy of the laws of the United States to conform the proceedings in the Federal Courts to the practice prevailing in the State Courts. There is much good reason in this. After all, the laws of the State are administered in the Federal Courts about the same as they are in the State Courts, and there is no apparent reason why there should be any difference in results to be obtained in resorting to either. The same rights are recognized in both. The same limitations and restrictions are recognized and enforced in both."

In 9th Federal Reporter, p. 247,
And in 34th Federal Reporter, p. 871,
it was held that the law of the State limiting the time in which an application should be made for a new trial was obligatory on a Federal Court.

Also in Clark vs. Sohier, 1st Wood. and Minot'. Rep., 368,
Also in 2nd Fed. Reporter, p. 23,
it was held that the local statute limiting the time in which notice of a trial of a common law case should be given, it was obligatory on the Federal Court. To the same effect 16th Blatch., 201. In the case at bar *no notice* of the motion was served at all.

These authorities simply apply the long-established principle of this Court, that the local statutes of the State are rules of decisions in trials at common law, and that in every case where the local statute confers a personal right, or affects the right of property, it will be recognized and enforced in the Federal Court. If, then, we are correct in the proposition that this Act of the Legislature in Florida, prohibiting a party from moving for a new trial after the lapse of four days from the verdict, confers the right on the plaintiff in this case not to have his verdict disturbed by the motion for a new trial after the lapse of that period, and confers on him a right to judgment after the expiration of that time, then the statute is obligatory on the Federal Court, and it was error in the Court below to entertain the motion for a new trial or to take any action thereon.

WANT OF JURISDICTION.

If the local statute in question is obligatory on the Federal Court, our contention is that the Court below had no jurisdiction to hear the motion for a new trial at all. Courts can do no judicial act except upon the application of the litigant. As the statute prohibited the party from making the motion, in the eye of the law the motion was never made, and was never before the Court. As the statute prohibited the defendants in this case from making a motion for a new trial at the time they made it, it also prohibited the Court from hearing the motion and from taking any action thereon. If it be argued that no State can make any law affecting the jurisdiction of the Federal Court, we answer that the argument does not apply. The State Legislature cannot, we admit, make any law acting directly on the Federal Court or its Judges, which has not been adopted or sanctioned by Act of Congress or rule of Court; but the laws of the State can affect, and do affect, the proceedings in the Federal Court in many ways by acting directly on the party to the litigation, and the Federal Court being bound to enforce such laws, these laws necessarily operate upon the Court. It is uniformly held under what is known as the Conformity Act, that the practice, pleadings, form and mode of proceedings, shall be the same in the Federal Court as in the State Court, and that the time limited by the State laws in which pleadings shall be filed and other proceedings had, shall be binding on the Federal Court and on a litigant in that court.

If the Federal Court is bound by statute or rule of a State Court as to the time in which a declaration, plea or replication shall be filed, for still stronger reasons should it be bound by statute fixing the TIME for a motion in this case.

At common law the Federal Court had power to set aside the general verdict where the declaration contained more than one count, if one of the counts were bad. Indeed, it was the duty of the appellate court to arrest a judgment upon several counts in a civil action, if one of the counts were bad. The State of Illinois changed this rule by statute, and provided that, whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration shall be sufficient to sustain the verdict.

In the case of Bond, *et al.* vs. Dustin, 112 U. S., 604, 609, it was held that this statute of Illinois was obligatory on the Federal Court. This statute of Illinois is as much a restriction or limitation of the powers of the Federal Court as a statute of the State of Florida, and we submit that its binding force on the Federal Court is more questionable than the statute of the State of Florida in question. The State of Illinois *directly prohibits the Court* itself from rendering a certain judgment which, prior to its enactment, it had the power to render. The statute of the State of Florida does not go so far as this ; it does not undertake to prohibit the Court from granting a new trial, or from interfering with the exercise of its power on a motion for a new trial, except that it limits the time in which the party can make the motion. We contend that the Florida statute is as much within Section 914 of the Revised Statutes as the Illinois statute above referred to, which this Court held to be within that section.

The defendants *were as much out of court* after expiration of four days from the verdict, by force of this statute, as at common law they would have been, after the expiration of the term, in respect to a motion for a new trial.

STATUTE OF LIMITATIONS AND NON-CLAIM.

The statute of the State of Florida limiting the time in which the motion for a new trial can be made, is in a certain sense a statute of limitation. Such statutes are obligatory in the Federal Court. In 113 U. S., p. 449, it was held that the law of the State, known as the Non-claim Statute, was binding on the Federal Court. Such a statute simply provides that a party *shall lose a right* unles he acts within a specified time. The Florida statute does the same thing and nothing more.

But if the Court had no power to entertain the motion for a new trial, then any order made thereon would be a nullity, and the fact that the defendants agreed to pay $5,000 and plaintiff agreed to accept $5,000 would not estop the plaintiff from litigating for the balance, either by motion for judgment on the verdict or otherwise. Receiving part payment of a claim does not of itself estop a creditor from suing for the balance.

22d Wall., 496.
Baldwin vs. U. S., 9th Rep., 702.

If the proceedings on page 7 of the record already discussed, are regarded as before this Court, we submit that they are a nullity; that the Court had no power to do what, on page 7, it is recited the Judge would do; and, even if the plaintiff consented to reduce the verdict, it would have been under a state of facts amounting to a species of coercion or undue influence, and would not estop the plaintiff from litigating for the balance of his claim.

7th Wall., 216, and cases cited.
26th N. Y., p. 12.

Assuming that the Court had no power or jurisdiction to do what is under discussion, the plaintiff would have been obliged to consent to reduce the verdict, or would have been compelled to have gone through another trial of his case before he could have obtained a final judgment on which a writ of error could be prosecuted. On a writ of error from a final judgment on the second trial the question could have been raised whether or not the Court had any jurisdiction to entertain the motion for a new trial or to take any action thereon. By consenting to a reduction of the verdict and having final judgment entered the plaintiff ought not to be held to be in any worse position than he would have been in after a second trial in respect to the question of the power of the Court to entertain a motion for a new trial. Plaintiff's consent to remit a part of the verdict under such circumstances would not preclude him from prosecuting a writ of error to raise the question whether or not any error had been committed to his prejudice.

It may be contended that the defendants would be irreparably injured by the reversal of the judgment of this Court. It is very obvious that they would be in no worse position than they would have been if a judgment for $10,000 had been entered on the verdict. If this Court reverses the judgment with direction that the judgment be entered upon the verdict of the jury, the defendants will have the same right *to prosecute their writ* of error that they would have had if such judgment had been entered up at the proper time. The result will be that that will have been done which ought to have been done at the time of the trial.

Again, if the plaintiff had submitted to a new trial and proceeded to a new trial, he might have waived any objection there was to the jurisdiction of the Court.

High on Extraordinary Remedies, Sec. 249, p. 209.

EXCESSIVE DAMAGES.

This was an action of libel. The defendants were found guilty of publishing the false charge against the plaintiff of murdering his own daughter. No more infamous libel could be published against any one. If the jury had found a verdict for $50,000 or $75,000, it could not have been considered excessive. A verdict of $10,000 on the finding of defendants guilty of publishing the charge that he murdered his own daughter, was an extremely moderate verdict. If the action of a court of justice could ever be properly pronounced outrageous, then the action of a court in attempting to disturb the verdict rendered upon such issues as this one was rendered, ought to be regarded as an outrage.

And we think it is a case in which this Court would be justified in adhering to all technical rules of law and procedure, or, in brushing them away, to the end that the plaintiff's right to a judgment for $10,000 be maintained.

If this verdict was disturbed by the action of the Court below, then we say that, considering the issues in the case, and the enormity of the outrage upon the plaintiff, it was a flagrant abuse of the discretion of the Court below, such as this Court ought to control.

We might add that the ground of excessive damages, upon which the motion for a new trial was based exclusively, is not one of the grounds upon which courts of law have usually granted new trials, as contemplated by the Act of Congress. For it is a fact that the courts of law in England, prior to the adoption of the Constitution of the United States, and the courts of law in this country since, have uniformly denied a motion for a new trial, in an action for libel, on the ground of excessive damages. The amount of the damages is left by the Constitution and laws of the country exclusively with the jury. It is very rare that a Court will disturb a verdict of a jury on the ground of excessive damages in any action of tort of this character, and we know of no case where the verdict of the jury has been disturbed on the ground of excessive damages in an action of libel of this character. We, therefore, say that when Congress passed that law, authorizing the Federal Courts to grant new trials for reasons for which new trials have usually been granted in courts of law, it was not contemplated that the Court should have power to disturb a verdict in a case of this character, except for improper conduct of the jury, which was not claimed in this case.

The matter on page 7 of the record, whether before the Court or not, shows that the motion for a new trial was not based on the ground that the jury were controlled by passion or prejudice and not governed by the evidence. It is simply a motion for a new trial on the ground that the verdict of the jury was excessive *without stating any reasons or grounds* upon which the verdict was claimed to be excessive. If what was done amounts in the judgment of this Court to the disturbing of the verdict in this case, then we say the action of the Court was purely arbitrary AND ought not to be sustained.

The record does not show affirmatively nor in any manner recognized by this *Court, that a motion for new trial was made at all. It does not pretend to show affirmatively that such a motion was ever filed in Court or placed on any motion docket. Nor does the record show affirmatively that any notice was given of such a motion. So far as it appears legally nothing of the kind took place. Nor does it appear that the Court ever made any order directing the verdict to be reduced.*

The Court cannot, we submit, *presume such an order was made.*

16 Wall., 165.
124 U. S., 261-284.

ABSOLUTE JUDGMENT.

So far as the record discloses any action of the Court the *Court did nothing after the verdict. It made no order. A suggestion of what the Judge would do is not the doing of it.*

In the Case 146 United States (Record, p. 147), this Court reviewed the action of the court below refusing to admit an affidavit on a motion for a new trial, and made it an exception to the rule that this Court will not review the action of the court below in granting and refusing a new trial, basing the exception on the ground that the Court did not exercise its judgment and discretion on the point presented. So we contend here that the Court never exercised its judgment on any motion for a new trial on grounds known to the common law, and made no order on such a motion, and that, consequently, the verdict has never been disturbed by any order of the Court, and that the plaintiff is entitled to judgment for the full amount thereof. It cannot be contended that a mere suggestion by the Judge of what he would do in the future has any force or effect. Courts and judges are not bound by such expressions, and on argument change views previously expressed.

Even if the matter contained on page 7 of the transcript is before the Court, the judgment appearing therein is not the judgment which the Court is made to say it would enter up if the plaintiff consented and the defendants agreed to pay it and not prosecute a writ of error. That judgment was a judgment for $5,000. The judgment which appears in the transcript is for $5,000, and costs, taxed at $644.25; and it has already been stated that the defendants never agreed to pay $5,644.25. What they are made to say on page 7 of the transcript is that they submitted to pay the said $5,000, and they were not bound to pay it, and had not covenanted or agreed in any binding way not to prosecute a writ of error. Nor could the Court compel the defendants not to prosecute a writ of error and pay the $5,000; and the plaintiff was not called upon, according to what appears to be the Court's suggestion, to consent to remit a part of the verdict unless the defendants agreed not to prosecute a writ of error and consented to pay $5,000, Of course such an agreement must have been an agreement which was absolutely obligatory upon the defendants; otherwise the plaintiff was not required to consent to it. As an obligatory agreement nowhere appears, the defendants could have prosecuted their writ of error at any time. In other words, the state of affairs upon which the Court said it would act was never brought into existence by the action of the parties.

The result of all this is that the so-called judgment for $5,644.25 was an absolute judgment and purely arbitrary, not based upon the verdict nor upon any order of the Court reducing the verdict, nor consent of plaintiff to its reduction ; and this the Court had no power to do. So expressly held in 131 United States, pages 22 and 30.

H. BISBEE,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
JAN 24 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

Term No., 208.

EDWARD H. LEWIS, PLAINTIFF IN ERROR,

vs.

GEORGE C. WILSON ET AL., DOING BUSINESS UNDER THE NAME AND STYLE OF THE FLORIDA PRINTING AND PUBLISHING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

BRIEF FOR DEFENDANTS IN ERROR.

WILKINSON CALL,
Attorney for Defendants.

In the Supreme Court of the United States

EDWARD H. LEWIS, PLAINTIFF IN ERROR,
vs.
GEO. C. WILSON, ET. AL., DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF FLORIDA.

FOR DEFENDANTS IN ERROR.

STATEMENT.

The plaintiff in error sued the defendants in error for an alleged libel; and at the *December* Term, 1887, and on the 9th day of April, 1888, upon trial had, the jury rendered a verdict for plaintiff assessing his damages at $10,000.00.

On the 16th of April, 1888, the defendants moved for a new trial, no judgment having *up to that time* been rendered on the verdict.

And the transcript, then, recites as follows:

Edward H. Lewis
vs.
Geo. C. Wilson et al. } December Term, 1887. Libel.

After the rendition of the verdict of the jury in this action and a motion by the defendants for a new trial on the ground that the damages assessed by the Jury were excessive.

The court said from the bench that the defendants' motion would be granted unless the plaintiff consents to reduce the verdict from ten to five thousand dollars.

As the verdict is clearly excessive if we eliminate all damages which arose out of the claim of the plaintiff for special damages to his business in Texas, and to which he could lay no claim under the pleading and evidence in this case, and which the court withdrew from the consideration of the jury.

And the court further said if the plaintiff consents to reduce the verdict to five thousand dollars in pursuance of this suggestion, and the defendants decline to pay the judgment for that amount and desire to prosecute a writ of error to the Supreme Court, then, in that event, judgment will be entered up for the sum of ten thousand dollars upon the verdict of the jury.

And afterwards, to-wit, on the 23d day of April, A.D. 1888, comes the plaintiff, by his attorney, and enters his consent to the reduction of the verdict of the jnry to the sum of five thousand dollars.

And then come the defendants, by their attorney, and submit to pay the said five thousand dollars.

It is therefore considered by the court that the plaintiff, Edward H. Lewis, do have and recover of and from the defendants, Geo. C. Wilson (and others, naming them), the sum of five thousand dollars and his costs, taxed at $644.25

Comes now the plaintiff, Edward H. Lewis, by H. Bisbee, his attorney, on this the 27th day of April, A.D. 1888, and acknowledges the receipt of five thousand six hundred and forty-four and 25-100 in full satisfaction of this judgment.

H. BISBEE, Att'y."

No objection, or exception, whatever, was made or noted to this ruling of the court; nor to the judgment, final, rendered by it. Nor was a bill of exceptions of any kind presented or filed in the cause.

On the contrary, the judgment that was rendered was a consent judgment; and said judgment was paid, with costs, to the plaintiff, who as shown by the transcript acknowledged the receipt of the amount of the judgment as rendered with costs, "in full satisfaction of this judgment."

No further proceedings of any kind, as shown by the transcript, were had at that term.

The next alleged "proceeding" copied in the transcript is a writing, bearing date Nov. 29th, 1889,—a date long after the adjournment of the term, in which the judgment was rendered, and, indeed, just before the close of the next succeeding term,—entitled as of and in a cause then pending in the court; but which does not appear to have been filed in any court; in words and figures as follows:

"In the Circuit Court of the United States, Northern District of Florida.

Edward H. Lewis }
vs. } Libel. Damages, $100,000.
Geo. C. Wilson et al. }

Comes now the plaintiff, by H. Bisbee, his attorney, and moves the court for a judgment on the verdict of the jury in the case, rendered on the 9th day of April, A. D. 1888, *nunc pro tunc* as of the date when it should have been rendered, according to law and the practice of this court, on the following grounds:

1st. Because said verdict was and is a legal verdict, duly rendered, and has not been set aside or modified by the court, nor in pursuance of any act or order of the court or any Judge thereof acting within its or his jurisdiction.

2nd. That all proceedings in this suit had and entered on the files of the court, its minutes, dockets, and records of the date of said verdict are null and void for want of jurisdiction of the court.

3rd. Because the defendants could not make the motion for a new trial, which they did make on the 16th day of April, A. D. 1888, on the ground that the laws of the State of Florida prohibited defendants from making a motion for a new trial after the expiration of four days from the date of the verdict rendered on the 9th day of April, A. D. 1888, and any action had on such motion was not within the jurisdiction of the court.

4th. Because plaintiff cannot apply to the Supreme Court for a writ of mandamus to order the court to enter judgment upon a verdict until a motion for such judgment has been refused, nor can defendant take a writ of error until a judgment on the verdict is entered up.

If the court enter judgment *nunc pro tunc* on the verdict for $10.000, plaintiff hereby offers and hereby binds himself to credit upon said judgment the sum of $5,000, paid by defendanta on plaintiff's claim, April 27th. A. D. 1889.

Nov. 29th, 1889.

H. BISBEE,

Att'y for Plaintiff.

To Messrs. A. W. Cockrell & Son, of counsel for defendants."

This writing, though addressed to Messrs. A.W. Cockrell & Son, of counsel for defendants, was not served on any one.

Memoranda are copied into the record showing this motion was denied; and upon this denial is noted the following: "To which ruling of the court plaintiff, by his counsel and attorney, excecpts." By what authority this writing, or the memoranda of denial by the Judge, or the exception thereto, got into the alleged record does not appear,

The certificate of the clerk appended to this transcript is entitled in the cause of Edward H. Lewis vs. The Florida Printing & Publishing Company and is that "the foregoing pages, numbered from 1 to 21 inclusive is a true, full and complete record of the papers used in the above entitled cause in the motion for a verdict on the judgment in the above cause." There was no motion to enroll the papers so used, whether taken from the motion, docket, or what not; nor were they made part of the record by bill of exceptions.

ARGUMENT.

The writ of error herein, was sued out April 23rd, 1890.

The only final judgment, disclosed by the transcript, rendered herein, was rendered April 23rd, 1888; hence, as to that judgment, the jurisdiction of the Supreme Court, as to the question of jurisdiction raised, is determined by the Act, 25 Stat. at Large, p. 693, ch. 236, approved February 25, 1889. That act, Section 2 provides as follows:

"That in cases of judgments or decrees mentioned in the first section of this act, and heretofore rendered, where the period of limitation for taking writs of error or appeals in other cases has not expired, appeals or writs of error may be sued out at any time within one year after the passage of this act."

If therefore, that judgment involved a question of jurisdiction, decided adversely to the plaintiff, the time for the correction, by writ of error, of that decision, was limited—the period for taking writs of error not having expired, at the passage of the act—to one year from February 25th 1889. Nor can the time for taking a writ of error under this statute, be enlarged by the simple expedient of entering a motion, at a succeeding term, to declare void the final judgment theretofore entered upon the verdict of the jury, April 23rd, 1888; and to have another final judgment entered—even though that motion was effective to bring the defendants to the final judgment, theretofore rendered, before the court, as parties litigant to a pending litigation, as upon proper process and pleading, of file and record in the court; and the judgment of the court, thereon, had been formally rendered and entered upon the minutes as *its* final judgment.

The utmost reach of such a judgment was a mere denial of the motion of the moveant.

2. The transcript fails to present, in a proper form, for the adjudication by this court, of the questions sought to be raised in the assignment of errors. Greenwood et al. vs. Randall, 111 U. S. 775.

The transcript, so far as can be gathered from the certificate of the clerk, does not purport to be a full and complete transcript of the proceedings, and the judgment of court, of record and file, in the case of E. H. Lewis vs. Geo. C. Wilson et al. It purports to be a "full and complete record of the papers used in the above entitled cause, in a motion for a verdict on the judgment, in the above cause."

Entries on the motion docket constitute no part of the record, unless made so by motion to enroll, or by bill of exceptions. Waring & Co. vs. Gilbert & Bro., 25 Ala. 295.

It certainly does not purport to be a true copy of the record, and of the assignments of error, and of all proceedings in the case; but the transcript is in terms confined to a record of the papers used in the motion for a verdict on the judgment in the above entitled cause.

Redfield vs. Parks et al. 130 U. S. 623.

As no such motion appears to have been made, the papers used on *that* motion are not identified as any part of the record, in this case.

2. The burden is on the plaintiff in error to show the amount in controversy is sufficient for jurisdiction in error.

Hagan vs. Froison, 10 Pet. 160.

The sum in dispute at the time of the final judgment determines the jurisdiction in error.

U. S. Bank vs. Daniel, 12 Pet. 32.

Interest accrued after judgment may not be included.

Walker vs. U. S., 4 Wall. 163.

At the time of entering judgment final in this cause, April 23, 1888, the *matter in controversy* between the parties did not exceed the sum of five thousand dollars.

Our contention is, that at the time of the entering of the judgment there was no matter, whatever in controversy, between the parties. The plaintiff at and before the entering of the judgment had agreed to reduce the verdict to five thousand dollars; and the defendants had agreed to submit to its payment.

But if the contention of the plaintiff in error, in this respect be sustained, the matter in actual controversy, at the time of entering the judgment did not exceed five thousand dollars.

3. The claim upon which plaintiff's suit was instituted was merged in the judgment April 23rd, 1888; and a satisfaction in full by the plaintiff of that judgment is a

satisfaction and extinguishment of the claim sued on. The sum paid by the defendants was not in part of the claim, but was in full of the judgment to which the claim was reduced; and was accepted by the plaintiff in full satisfaction of his judgment. Apart from any question of consent, such acknowledgment of satisfaction operates as a release of errors.

4. The plaintiff is estopped, upon this record, from asserting that error was committed to his prejudice in the court below. The record introduced here by him shows that the trial court declared that "the verdict was clearly excessive, if we eliminate all damages which arose out of the claim of the plaintiff for special damages to his business in Texas, and to which he could lay no claim under the pleading and evidence in this case, and which the court withdrew from the consideration of the jury." And that thereupon, the plaintiff enters his consent to a reduction of the verdict of the jury to the sum of five thousand dollars. And upon this consent, secured a judgment, which the court would not otherwise have rendered, discharged from liability to reversal or the supervision of the Supreme Court.

5. The Florida statute regulating motions for new trials does not govern the Federal courts.

The Florida statute makes provisions for a review of the ruling of the circuit court, granting or refusing a motion for a new trial, and limits the time, within which such a motion may be made to four days after the *verdict*, without reference to the *judgment* rendered thereon.

The U. S. Statute, Sec. 987 U. S. Rev. Statutes, having reference to the exercise, under common law rules, of the irrevisable discretion of the judges, in granting or refusihg a motion for a new trial, puts no limitation with reference to the *verdict* upon the time, within which a new trial may be moved for; the limitation does not begin to run until after the court has rendered *judgment* upon the verdict. The common law powers, with which a Federal Judge is clothed, permits him to set aside an unconscionable or clearly excessive verdict, at any time before he has rendered a judgment sustaining it, whether moved for or